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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 881

ANNE FRANCOLINO,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EVSEROFF, NEWMAN & SONENSHINE
Attorneys for Petitioner
Office & P. O. Address
186 Joralemon Street
Brooklyn New York 11201
UL 5-1111

WILLIAM SONENSHINE
Member of the Bar of the
Supreme Court of the United States
Of Counsel

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To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The above-named petitioner respectfully prays this Court for a writ of certiorari to the United States Court of Appeals for the Second Circuit, as follows:

A. Opinions Below

The United States Court of Appeals for the Second Circuit by judgment entered on November 3, 1966 (Docket No. 30601) unanimously affirmed a judgment entered in the United States District Court for the Eastern District of New York, convicting petitioner of three counts of passing $10 counterfeit notes in violation of Title 18 United States

Code Section 472. Petitioner was acquitted of the fourth count in said indictment which had charged her with possession of a quantity of such notes in violation of the same statute.

Said convictions were rendered after trial by jury before Hon. John R. Bartels, a Judge of said Court. The opinion of the United States Court of Appeals for the Second Circuit (not yet officially reported) is set forth in Appendix A hereto.

The opinion of Hon. John R. Bartels, a Judge of said Court, denying as to petitioner a pre-trial motion to suppress is set forth in Appendix B. That opinion is not officially reported.

There were no other opinions written in connection with the case.

B. The Grounds on Which the Jurisdiction of this Court is Invoked

Jurisdiction of this Court is invoked under Title 28, Section 1254, subdivision 1 of the United States Code, and under Rule 19, subdivision 1, of the Rules of This Court.

The Judgment sought to be reviewed herein is the judgment of the United States Court of Appeals for the Second Circuit entered on November 3, 1966, as aforesaid.

C. The Questions Presented for Review

(1) Was the warrantless search of an unoccupied vehicle outside the house in which petitioner had been arrested and to which the federal agents had acquired possession of the keys unlawfully made without probable cause to be-

lieve that it contained contraband in consequence to which the counterfeit bills found therein should have been suppressed from introduction into evidence?

(2) Do the forfeiture provisions under Section 781-784 of Title 49 of the U. S. Code furnish a constitutional basis to justify a warrantless search of the aforementioned vehicle?

D. Constitutional Provisions and Statutes Involved

(1) The constitutional provision involved is the search and seizure provision of the Fourth Amendment to the United States Constitution.

(2) The statutes involved are Sections 781-784 of Title 49 United States Code.

Pertinent parts of each of the foregoing are set forth in Appendices C and D respectively of this petition.

E. A Concise Statement of the Case and Material Facts Pertaining to the Consideration of the Questions Presented

Petitioner was indicted in the Eastern District of New York, (64 CR 390), along with her husband Joseph Francolino, against whom the indictment was dismissed following the granting as to him of the motion to suppress the evidence. The indictment charged four (4) counts. The first count alleged that petitioner passed two (2) counterfeit $10 Federal Reserve Notes on July 24, 1964, within the Eastern District of New York in violation of Title 18 U.S. Code sections 2 and 472. The second count contained the

same charge but referred to one $10 note. The third count contained the same charge but referred to three (3) $10 notes. The fourth count charged petitioner with possessing and concealing 1,973 of such $10 notes in violation of the statute.

Trial commenced before Hon. John R. Bartels, a United States District Judge and jury in the United States District Court for the Eastern District of New York on March 15, 1966, and concluded with the verdict of the jury on March 18, 1966. By said verdict petitioner was found guilty under the first three (3) counts. She was acquitted under the fourth count of the indictment. On May 6, 1966 petitioner was sentenced by Judge Bartels to be committed to the custody of the Attorney General for a period of 18 months.

On appeal to the Court of Appeals for the Second Circuit, the judgment was affirmed on November 3, 1964.

The opinions of the Judges of the Court of Appeals set forth all the pertinent facts and arguments advanced below. Accordingly, those facts are not reiterated herein.

F. Basis for a Jurisdiction in the United States District Court

The jurisdiction of the United States District Court for the Eastern District of New York was invoked upon the ground that the crime charged was a violation of a federal law, to wit: Section 472 of Title 18 of the United States Code, allegedly violated within the Eastern District of New York.

G. Argument Amplifying the Reasons Relied on for the Allowance of the Writ

POINT ONE

(a) The search without a warrant of the unoccupied vehicle parked outside the house in which petitioner was arrested and to which the federal agents had acquired possession of the keys was unlawfully made without probable cause to believe that it contained contraband and, consequently, the counterfeit bills found therein should have been suppressed from introduction into evidence.

(b) The application of 49 United States Code, Sections 781-784 as a basis for justifying the warrantless search amounts to an unconstitutional application of the statute by diminishing the standards imposed for a search and seizure under the Fourth Amendment to the United States Constitution.

The opinions below for affirmance of the judgment proceeded upon two grounds with respect to the issue of search and seizure. The entire Court was in agreement that notwithstanding this Court's recent decision in *Preston* v. *U.S.*, 376 U.S. 364 (1964), which the Court of Appeals held to be inapplicable, it was proper to search the unoccupied distant vehicle without a warrant as an incident of the arrest.

The second ground upon which the judgment below was affirmed presented a disagreement within the Court. Chief Judge Lumbard and Judge Friendly held that Section 782 of Title 49 U.S. Code authorized a seizure of the vehicle which in turn authorized the search thereof. Judge Kaufman disagreed, writing that the seizure of the car did not authorize a search without a warrant under the statute.

It is our position herein that the warrantless search of the vehicle was unlawful for the reasons hereinafter set forth and, further, that Judge Kaufman correctly stated the applicable law with respect to the effect of Section 782.

With respect to the basic validity of the search of the vehicle we respectfully urge as follows:

Even if the Government were to have met their burden and shown that probable cause did exist for the arrest of petitioner nevertheless the ensuing search of the vehicle outside the house was unlawful. For at this point we must determine whether even if the arrest was lawful, was the ensuing search incidental thereto? We think not. The entire topic of a search incidental to a lawful arrest including the philosophical justification therefor was discussed by the United States Supreme Court in the case of *Preston* v. *United States,* 376 U.S. 365 (1963). Since we feel it has cogent application at bar, we take the liberty of setting forth an extensive segment of that decision as it appeared at pages 367 and 368.

> "Unquestionably, when a person is lawfully arrested, the police have the right, without a search warrant, to make a contemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit the crime. *Weeks* v. *United States,* 232 U.S. 383, 392 (1914); *Agnello* v. *United States,* 269 U.S. 20, 30 (1925). This right to search and seize without a search warrant extends to things under the accused's immediate control, *Carroll* v. *United States, supra,* 267 U.S., at 158, and to an extent depending on the circumstances of the case, to the place where he is arrested, *Agnello* v. *United States, supra,* 269 U.S., at 30; *Marron* v. *United*

States, 275 U.S. 192, 199 (1927); *United States* v. *Rabinowitz,* 339 U.S. 56. 61-62 (1950). The rule allowing contemporaneous searches is justified, for example, by the need to seize weapons and other things, which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime—things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control. But these justifications are absent where a search is remote in time or place from the arrest. *Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest.* *Agnello* v. *United States, supra,* 269 U.S. at 31. Here, we may assume, as the Government urges, that either because the arrests were valid or because the police had probable cause to think the car stolen, the police had the right to search the car when they first came on the scene. But this does not decide the question of the reasonableness of a search at a later time and at another place. See *Storer* v. *California, post,* p. 483. The search of the car was not undertaken until petitioner and his companions had been arrested and taken in custody to the police station and the car had been towed to the garage. At this point there was no danger that any of the men arrested could have used any weapons in the car or could have destroyed any evidence of a crime—assuming that there are articles which can be the "fruits" or "implements" of the crime of vagrancy. Cf. *United States* v. *Jeffers,* 342 U.S. 48, 51-52 (1951). Nor, since the men were under arrest at the police station and the car was in police custody at a garage, was there any danger that the car would be moved out of the locality or jurisdiction. See, *Carroll* v. *United States, supra,* 267 U.S., at 153. We think that the search was too remote in time or place

> to have been made as incidental to the arrest and conclude, therefore, that the search of the car without a warrant failed to meet the test of reasonableness under the Fourth Amendment, rendering the evidence obtained as a result of the search inadmissable." (Italics ours.)

In applying the principles thus enunciated by the Supreme Court to the facts at bar, we note certain immediate failings in the instant case. The defendants were clearly under arrest in the house. The automobile was of course, outside the house and the Agent had obtained possession of the keys. The car was not "under the accused's immediate control," so to justify the search thereof. The car was not the scene of the arrest. Therefore, there was no basis for a warrantless search of the car. The entire philosophical and rational basis for permitting a contemporaneous search, namely, to prevent the prisoner having access to weapons to hurt the officer or effect his escape, or to prevent the destruction of evidence is clearly absent in this case.

The usual argument that there is greater leeway in a search involving a motor vehicle is not available to the Government at bar. In the instant case, the car was parked, the officer had possession of the keys, the defendants were in custody and moreover, there was no basis for believing there was any counterfeit notes in the car. In the case of *Staples* v. *United States,* 320 F. 2d 817 (1963) the Circuit Court of Appeals for the Fifth Circuit in discussing similar facts stated at page 820,

> "There was no more than suspicion that the automobile might contain counterfeit notes.

> "Moreover, with McNamara in custody and the officers in possession of the keys to the automobile, it may be also that its search was illegal because the car was 'not likely to be disturbed' before a search warrant could be obtained. See *Kent* v. *United States*, 5 Cir. 1954, 209 F. 2d 893; *Shurman* v. *United States*, 5 Cir. 1955, 219 F. 2d 282."

The principles enunciated therein are equally applicable at bar. No undue haste was required with the defendant in custody and the Agent in possession of the keys. He should have obtained a warrant to search this stationary automobile or he could have moved it to police headquarters (as he ultimately did) and then obtain a warrant to search it. The principle of the *Staples case, supra,* had been previously enunciated by the Circuit Court of Appeals for the Seventh Circuit in the case of *United States* v. *Stoffey*, 279 F. 2d 924 (1960). In the *Stoffey case,* they were dealing with a car parked right outside a tavern which was the scene of the arrest. The Court in holding the search of the car invalid stated at page 928:

> "The seizure of the car was not incidental to the arrest of the defendant. The arrest both in fact and in law was consummated before the car was seized. There was no risk of the car being driven away while a search warrant was being obtained."

In short, it is the petitioner's contention as recently stated so cogently by Judge Weinfeld in *Conti* v. *Morgenthau*, 232 F. Supp. 1009 in reliance upon *Stone* v. *California*, 376 U.S. 483 and the *Preston Case, supra,* that:

> "A locked and unoccupied car whose owner is in police custody at another place can only be searched pursuant to a valid warrant."

There is yet a third and somewhat unrelated reason why the motion to suppress the contents of the car as against the petitioner should have been granted. It will be noted that there was some discrepancy in testimony, as to how the Agent obtained possession of the keys to the car and from whom. Suffice it to say, he ultimately obtained the keys from petitioner or her mother-in-law. What is undisputed is that Joseph Francolino initially had the keys in his possession up to and subsequent to his being placed under arrest. He did not remove the keys from his pocket until the Agent threatened to search him. The relevant testimony is set forth in a truncated answer by the Agent Sershen:

> "A. I said I am taking both of them into the precinct or the stationhouse with the officers. We then went down into the dining room where Mr. and Mrs. Francolino Sr., were, and I told Mr. Francolino that I was going to search him this was immediately after the arrest, and he then took or went to his pocket and took out the keys, which I figured were the keys to the car, and he gave them to his mother.
> "So I asked the mother to give them to me. She immediately gave them to Mrs. Francolino. I went toward Mrs. Francolino, and she pushed the keys towards me, gave me the keys in her hands—."

The keys were obtained from Joseph Francolino after he was arrested and after he was threatened to be searched. He produced them pursuant to that threat and irrespective of the route they took, they were obtained by the Agent pursuant to his post-arrest threat to search. The motion to suppress brought by Joseph Francolino was granted. Therefore, everything seized from him should have been

suppressed including the keys, for they were also the fruits of the threatened illegal search. The keys were the fruits of the poisonous tree via the unlawful search (or its threatened equivalent) of Joseph Francolino and could not be used against Anne Francolino. (*Wong Sun* v. *United States,* 1963, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 44.)

For all of the foregoing reasons the motion to suppress on behalf of petitioner Anne Francolino should have been granted.

It was petitioner's position upon the trial that at the behest of her husband, she had simply changed some bills at the Floyd Bennett Stores without knowing that they were counterfeit. Her testimony in this regard, if credited by the jury, would have entitled her to an acquittal. This issue lay at the heart of the case. Her guilt or innocence in the eyes of the jury depended upon her credibility. That credibility, it should be observed, was not as to a physically discernible fact, but, rather, as to the operation of her own mind.

Thus, the crucial significance of the money in the trunk of the car *vis-a-vis* appellant's defense becomes self-evident. If the facts presented to the jury did not embrace the money in the car, the jury might well have credited appellant's version, or at the very least, given her the benefit of a reasonable doubt. Appellant, at the time of the trial was twenty-four years of age, had been married 3½ years and was the mother of two (2) young children. She had never been arrested before. Her education consisted of two years of high school followed by pre-marital employment as a typist. Based upon her background, her version of the events at issue was plausible and entitled to a fair consideration by the jury.

That jury, however, was improperly presented with an explosive piece of evidence—to wit, 1,973 counterfeit bills found in the trunk of a car, but not connected with her. This evidence could only have converted her in the eyes of the jury from a possibly innocent young woman to a calculating participant in a large-scale counterfeiting scheme. The corrosive nature of such evidence upon the foundation of her defense needs no further elaboration. Its improper admission into evidence was so prejudicial as to have precluded the jury from rendering a proper verdict based upon legal evidence.

With respect to the forfeiture statute we have previously indicated, that we believe in the legal accuracy of Judge Kaufman's views. We, therefore, rely upon them and adopt them herein.

In addition, we further urge that use of this forfeiture statute to sustain a warrantless search in the manner permitted by the Second Circuit would amount to an unconstitutional congressional curtailment of the rights against unlawful searches and seizures secured to citizens by the Fourth Amendment to the United States Constitution. This Court has in numerous decisions promulgated a body of law under the aegis of the Fourth Amendment with respect to the search of vehicles. That body of law has the force and effect of constitutional law by reason of its interpretations thereof. It would follow then that Congress would not have the power to enact a statute which runs counter to these principles which determines what the constitution itself means. Yet, the Court below in sustaining the use of the forfeiture statute as the basis for a search without a warrant has in effect done away with

the need for a warrant in such cases although this Court has clearly indicated that the Constitution cannot permit it. *Preston* v. *U.S., supra.*

We believe the issues hereunder are matters of considerable importance to criminal prosecutions in this country. We believe that the determination by the United States Court of Appeals for the Second Circuit is in direct conflict with this Court holding in *Preston.* Indeed, a reading of the opinion below indicates the difficult problem which this issue presented to that Court.

With respect to the forfeiture statute, it appears from both opinions below that there is a dearth of decisions by this Court on the issue. Since this decision below may now serve to give rise to a great many similar occurrences with varying possible interpretations in the law of the constitution it would seem appropriate that this Court grant certiorari and provide for the country a standard of guidance along these lines. We respectfully so urge.

CONCLUSION

The petition for certiorari should be granted and this Court, in the exercise of its powers, should order that the judgment of conviction be reversed and the indictment dismissed, or a new trial ordered.

Respectfully yours,

EVSEROFF, NEWMAN & SONENSHINE
Attorneys for Petitioner

WILLIAM SONENSHINE
Of Counsel